



## *Liability for Defects in Construction Contracts - who pays and how much?*

### Introduction

1. Unsurprisingly, defects are one of the major causes of dispute and construction litigation. Dealing with construction failures requires various degrees of familiarity with law, building technology and practice. There is often disagreement when it comes to identifying what a construction defect is. This, of course, will be down to the differing viewpoints and interests of those who are asking the question and/or making the determination. These parties typically include the builder, developer, contractor, subcontractor, material supplier, product manufacturer and homeowner.
2. There is no short answer to this question. However, there is a big difference between a construction defect and a nuisance claim such as a squeaking floor or conditions resulting from lack of maintenance or normal wear and tear. Construction defects could range from complex foundation and framing issues, which threaten the structural integrity of buildings, to aesthetic issues such as improperly painted surfaces and deteriorating wood trim around windows and doors.
3. The courts have recognised that construction defects can be grouped into the following four major categories:
  - (i) Design deficiencies
  - (ii) Material deficiencies
  - (iii) Specification problems
  - (iv) Workmanship deficiencies
4. The purpose of this paper is twofold:
  - (i) First, to review how a typical English contract treats defects from the viewpoint of the relationship between the employer and contractor;
  - (ii) Second, to consider how damages for defects are assessed in other words the cost of reinstatement versus diminution in value.

### Liability for defects under the Contract

5. Contracts have been around for a long time. One of the first could be said to be the code of Hammurabi.<sup>1</sup> As one would expect, this dealt with payment:

If a builder builds a house for someone and completes it, he shall give him a fee of two shekels in money for each sar of surface.
6. The code also dealt with responsibility for any defects. Here the position was admirably clear, if ultimately a little harsh:

If a builder builds a house for a man and does not make its construction meet the requirements and a wall falls in, that builder shall strengthen the wall at his own expense.

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1. King Hammurabi ruled the kingdom of Babylon from 1792 to 1750 BC

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If a builder builds a house for a man and does not make its construction firm and the house which he has built collapses and causes the death of the owner of the house that builder shall be put to death.

If the son of the owner dies, the son of the builder shall be killed.

7. Times have moved on. One of the typical contractual regimes in England can be found with the JCT scheme of contracts.
8. These were revised in 2005 and the Standard Form of Building Contract 1998 Edition has been replaced with what is known as the Standard Building Contract or SBC. What I propose to do is consider how the SBC regime deals with defects.
9. The situation is as follows:

Section 2.1 - The contractor's obligation is to carry out and complete the works in a proper and workmanlike manner as shown on the contract documents, save to the extent these are varied. If defects occur during this time, the contractor must remedy those for which he is responsible at no extra cost. In addition, the contractor will be responsible if the need to remedy these defects causes delay to the project.

The materials, goods and workmanship must be to the standards described in the contract and to the reasonable satisfaction of the architect. Typically this means that the contractor must carry out the construction works with skill and care, using good quality materials.

Condition 2.30 - Here, the architect/contract administrator will certify that the works are practically complete. It would be fair to say that most people treat practical completion as meaning the stage at which the works are reasonably ready for their intended use, even though there may be an outstanding "snagging" or "punch" list.

Under English law, that is not what the authorities suggest. They seem to suggest the works must be free from patent defects. In *HW Neville (Sunblest) Limited v William Press & Son Limited* HHJ Newey QC said:

I think that the word "practically" in Clause 15(1) gave the Architect a discretion to certify that William Press had fulfilled its obligation under Clause 21(1) where very minor de minimis works had not been carried out, but if there were any patent defects in what William Press had done the Architect could not have given a certificate of practical completion.

In the earlier House of Lords' judgment in *City of Westminster v Jarvis*, Viscount Dilhorne had said:

The Contract does not define what is meant by "practically completed". One would normally say that a task was practically completed when it was almost but not entirely finished; but "Practical Completion" suggests that that is not the intended meaning and that what is meant is the completion of all the Construction work that had to be done.

An alternative is the Taking-Over Certificate, for example under clause 10.1(a) of the FIDIC General Conditions, the engineer will:

issue the Taking-Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract, except for any minor outstanding work and defects which will not substantially affect the use of the Works or Section for their intended purpose (either until or whilst this work is completed and these defects are remedied).

Under the Society of Construction Law Delay and Disruption Protocol, "Substantial Completion" is bracketed with Practical Completion and

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both are defined as the completion of all the construction work that has to be done, subject only to very minor items of work left incomplete. This definition is close to the words of Salmon LJ who in *Jarvis v Westminster* said of Practical Completion that it was completion:

for all practical purposes, that is to say for purpose of allowing the employer to take possession of the works and use them as intended, but not "completion" down to the last detail, however trivial and unimportant.

It is accordingly suggested that the works will be substantially in accordance with the contract if they are free from known defects which would prevent the employer from taking over and making use of the project.

Condition 2.38 - After Practical Completion there is a Rectification (previously Defects Liability) Period (usually a period of between 6 and 12 months). During this time, the architect may require the contractor to make good any defects that appear.

The Rectification Period is akin to a guarantee period and the contractor usually has the obligation, and indeed the right, to remedy defects appearing within this time. The contractor does not get paid for this. However, the practice is to the benefit of both parties since the contractor would otherwise be liable for the greater cost of another contractor remedying the defects.

What should be understood is that a provision for the making good of defects within this period does not deprive the employer of his damages for defects appearing outside that period nor will it serve to extend the time allowed to the contractor to finish the works correctly.

When all defects and shrinkages and other faults have been made good, the architect/contract administrator shall issue a certificate to that effect.

Condition 2.32 & 2.3.7 - This is the liquidated (or delay) damages clause, whereby the employer may recover specified damages if the architect certifies that the contractor has failed to complete the works by the Completion Date. Where there is such a clause, this will represent the employer's sole remedy for late completion.

Condition 3.18 - Where there is work not in accordance with the contract the architect can require that it is made good at the contractor's cost (in terms of time and money).

Condition 4.18.20 - This is the retention. During the contract, the employer retains 5% of whatever would otherwise be payable on interim certificates. Of this, 2.5% is released to the contractor on Practical Completion, and the other 2.5% is released when the architect certifies that the contractor has made good the defects appearing within the defects liability period.

Condition 4.15 - The Final Certificate is usually due about a year after Practical Completion. It sets out the final state of the payment account and is conclusive about that. In England, there has been some controversy as to whether the Final Certificate is conclusive as to quality matters.<sup>2</sup>

Understandably, it is impossible for an architect to know with any certainty whether there are any latent (or hidden) defects in the contractor's work. Therefore an employer will ordinarily expect to have the benefit of the usual limitation period, so that if any latent defects appear during that limitation period, then he is able to sue the

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2. See the Court of Appeal decision in *Crown Estate Commissioners v John Mowlem & Co Limited*

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contractor, whether a Final Certificate has been issued or not. To avoid any such difficulties, the JCT introduced the following caveat at clause 1.11:

no Certificate shall of itself be conclusive evidence that any works, any materials or goods or any design completed by the Contractor are in accordance with this Contract.

10. Thus, under the contract the question of liability is, on the face of it, fairly straightforward. That is, liability in respect of two of the four typical defects mentioned earlier material and workmanship deficiencies. Questions relating to the specification and design are more problematical, even bearing in mind that the SBC does not envisage the contractor carrying out any element of design.
11. To take the specification first. You would expect liability for any errors here to depend on who produced the specification in question.
12. The general law position is that an employer under a construction contract does not impliedly warrant the feasibility of the design set out in the contract documents.<sup>3</sup> In fact there is a long line of cases noted for their arguments made for the contractor that what they contracted to do was “impossible”, and they sought to argue frustration of contract.
13. The most (in)famous is *Tharsis Sulphur & Copper Co v M’Elroy (1878)*.<sup>4</sup> This was a House of Lords’ decision, where the respondents were employed to erect a structure including cast-iron trough girders. They attempted to cast the girders in accordance with the specified dimensions, but found that the girders were liable to warp and crack at that thickness. They therefore proposed that they would cast the girders with increased thickness to overcome the problem. The appellants acquiesced, but did not order the change or agree to pay any increased price. On completion of the work, the respondent contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied. The claim was rejected. The Lord Chancellor commented, at pp. 1043/44:

On the other hand, the Respondents were in this position: they were obliged to execute the work; as I understand the contract they were obliged to execute it with the girders. If they could not cast the girders of the scantling, that is to say, of the exact thickness, mentioned in the contract, that was so much the worse for them. They ought to have known that when they undertook to execute the work in that form. Therefore they must have submitted to one of two things; either they must have refused to go on with the work, exposing themselves to the risk of being proceeded against for damages for not fulfilling their contract, or they must have increased the size, the scantling, of the girders to such an extent as would counteract the cracking to which the smaller scantlings subjected the girders.

14. Lord Hatherley agreed, concluding, at p.1050:

What the company permitted the Respondents to do was only for their own convenience, and that being so, there is nothing to support the claim made by the Respondents to be paid for it as extra work.

15. This is to be contrasted with the judgment of HHJ Stabb QC in *Turriff Ltd v Welsh National Water Development Authority*.<sup>5</sup>
16. Turriff concerned a contract under the fourth edition of the ICE Conditions. The contractor claimed that it was impossible to lay the precast concrete culvert units within the tolerances laid down in the specification. Counsel argued that, in the context of clause 13,

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3. *Thorn v London Corporation (1876)* - 1 App Cas 120

4. 3 App Cas 1040

5. [1994] Const LY 122.

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“impossible” should be construed as “absolutely impossible”, but HHJ Stabb held that impossibility was to be interpreted in a practical or commercial sense, and that if it had to be interpreted strictly, it had to be interpreted strictly against both parties:

Turriff’s contractual obligation was to manufacture, lay and joint the units in accordance with the drawings and the specification. I have already indicated that it was in that strict context, absolutely as well as practically impossible successfully to joint them. It was not, plainly, absolutely impossible to manufacture the units to the required dimensions and tolerance, but in the ordinary competitive commercial sense, which the parties plainly intended, I am satisfied that it was quite impossible for Turriff to achieve the degree of dimensional accuracy required.

17. The case is significant in taking a pragmatic view of impossibility in favour of the contractor. The judgment is also notable for the significance attached by HHJ Stabb to the extensive pre-contract studies carried out by the employer on the precast units. He explained their significance as “part of the contractual matrix” within which the contract was to be interpreted.
18. Traditionally, when an employer engages a contractor to construct a building on the basis that the building will be constructed in accordance with an architect’s (or other design professional’s) design supplied by the employer, then in this situation, the contractor, whilst agreeing to carry out the works in accordance with the design documents, makes no promise that the building will fulfil its intended purpose, save in those rare instances where such can be shown objectively to have been the case. Some limited design responsibility may, however, be placed on a contractor. For example, by virtue of the design documents failing to specify all materials, a choice of materials is left to the skill and judgment of the contractor and this is a rich vein for disputes. In addition, by condition 2.17.2.1 of the SBC, the contractor has to comply with statutory requirements.
19. Thus, where the contract is silent as to some materials to be used in the construction the contractor is still obliged to choose and apply materials in order to carry out the works in accordance with his express undertaking. Such choice is aimed towards the expressly agreed result, that is, the completed building.
20. With the ordinary lump sum contract (not being design and build) one can usefully consider the question the contractor will often be confronted by, the choice of working methods and temporary works (that is, “how” as opposed to the “what” of construction). The “how” bit in the absence of a specification telling him how to do the works, is for the contractor to decide and the employer will have no duty of guidance or intervention to the contractor.
21. One issue that is not so straightforward can arise in traditional contracts where the design is not the responsibility of the contractor but that of another, usually the architect, and that is the categorisation of a particular defect. Is it a design defect or a defect of workmanship? To take two examples, the choice between a flat roof and a pitched roof will be a matter of design, but the choice between a screw and a nail may well be a matter of workmanship. As indicated by the authors of *Building Contract Disputes: Practice and Precedents*:<sup>6</sup>

As a rule of thumb, the shape, dimensions, choice of material and other matters apparent from the drawings are generally regarded as design matters and the things left over for the good sense of the contractor are generally

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regarded as matters of workmanship.

22. An example of this can be found in the recent case of *Sinclair v Woods of Winchester*<sup>7</sup> which examined the main contractor's liability for defects to a swimming pool complex. The Sinclairs had the defects remedied themselves at a cost of £225,000. The main problem was in relation to defects in the flat roofs over the pool and the fact that the boiler, there to heat the pool, was undersized.

23. One key issue was the question of the operative cause of the problem with the flat roofs. An arbitrator decided that whilst some areas were attributable to the Defendant's contract, they did not cause the underlying problem with the flat roofs. The design of the flat roofs meant that they were doomed to fail. The key question was one of causation and, as Judge Coulson noted, that when considering causation, there is no formal test.

24. The courts rely on common sense to guide decisions as well as whether any alleged breaches are a sufficiently substantial cause of the loss. HHJ Wilcox said in the case of *Great Eastern Hotel Co Ltd v John Laing Construction Ltd & Anor* [2005] EWHC 181:

The Courts have avoided laying down any formal test for causation. They have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the Claimants' loss. The answer to whether the breach is the cause of the loss, or merely the occasion for loss must "in the end" depend on "the court's common sense" in interpreting the facts.

25. With the question of liability for defective specialist design, certain items had been installed in accordance with the design of the heating system which was part of the specialist design work carried out by the respondent's nominated subcontractor. In other words, if a main contractor subcontracts works to a nominated subcontractor, and then a nominated subcontractor carries out design work as well, is the main contractor, without more, liable to the employer for that design work? The Judge said the answer to that question was emphatically no.

26. Where an employer nominates a specialist subcontractor to carry out work, one of the reasons for this is that the subcontractor will be performing a specialist design function in addition to the actual carrying out of the works on site. In such circumstances, the design work performed by the specialist subcontractor is usually, and ought to be, subject of a direct warranty from the specialist subcontractor to the employer. If the carrying out of the work on site is subcontracted by the main contractor to the nominated subcontractor, the extent to which the main contractor is liable for defects in the workmanship of the nominated subcontractor, will depend on the precise terms of the various contracts.

27. Here, the main contract documents did not include any obligation on the part of the defendants to perform any design work at all. A main contractor cannot "mysteriously acquire" design liability merely because he is instructed to enter into a subcontract with a nominated subcontractor who is going to do some design work on behalf of the employer.

28. However, a contractor should always take care to consider the implications of the design, even if he thinks he has no design responsibility whatsoever. In some jurisdictions a contractor is under a duty to warn the employer of any problems with the design.

7. [2006] EWHC 3003 (TCC)

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29. The Supreme Court of Canada in *Brunswick Construction v Nowlan*<sup>8</sup> held that a contractor executing work in accordance with plans of the employer's architect is under a duty to warn the employer of obvious design defects.
30. The situation in England is slightly different. Prior to 2000, it was not clear whether there was a duty to warn.<sup>9</sup> In *Plant v Adams*,<sup>10</sup> whilst the Court of Appeal expressly reserved its position as to such an obligation where there was a design defect which the subcontractor knew or ought to have known about which was not dangerous. Where there was potential danger, it held that it was clear that a subcontractor owed a duty of care to point out design faults and was required to protest vigorously and even walk offsite, unless a safe design was produced.
31. A slightly different approach was suggested by the subsequent case of *Aurum Investments Limited v Avonforce Limited (in liquidation)*,<sup>11</sup> where an underpinning subcontractor was held not to be liable under the duty to warn principle when part of the excavation work collapsed. The subcontractor could not know of the design and build contractor's method or work. Mr Justice Dyson said that:

the law is moving with caution in this area ... a court should not hold a contractor to be under a duty to warn his client unless it is reasonable to do so.

32. Where a contractor is liable for design, care is required to ensure that the extent of that responsibility is carefully spelt out. In a "design and build" contract, the case law over the years has shown that the contractor, in the absence of an express contractual rebuttal, will be under an obligation to ensure that the finished product will be (reasonably) "fit for its intended purpose". Sometimes, the design obligation can be found in more traditional contracts, where the contractor might not be expecting any design obligation. To take clause 4.1 of the new FIDIC form, this states:

If the Contract specifies that the Contractor shall design any part of the Permanent Works, then unless otherwise stated in the Particular Conditions: ...

c) The Contractor shall be responsible for this part and it shall, when the works are completed, be fit for such purposes for which the part is intended as are specified in the Contract;

33. Therefore the prudent contractor would be advised to alert the employer to any obvious design defects that he comes across.
34. Under English or Common law, the fitness for purpose duty is stricter than the ordinary responsibility of an architect or other consultant carrying out design where the implied obligation is one of reasonable competence to "exercise due care, skill and diligence". In *Greaves v Baynham Meikle*,<sup>12</sup> Lord Denning said this of the fitness for purpose obligation:-

Now, as between the building owners and the Contractors, it is plain that the owners made known to the Contractors the purpose for which the building was required, so as to show that they relied on the Contractors' skill and judgement. It was, therefore, the duty of the Contractors to see that the finished work was reasonably fit for the purpose for which they knew it was required. It was not merely an obligation to use reasonable care, the Contractors were obliged to ensure that the finished work was reasonably fit for the purpose.

35. The duty is, therefore, absolute.
36. In *IBA v EMI and BICC*,<sup>13</sup> Lord Scarman said:

8. (1974) 21 BLR 27

9. There were conflicting authorities. See *Victoria University of Manchester v Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited* [1984] CILL 126 and *University of Glasgow v W. Whitfield and John Laing Construction Limited* [1988] 42 BLR 66

10. (2000) BLR 205

11. [2001] CILL 1729

12. [1975] 1 WLR 1095

13. (1980) 14 BLR

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In the absence of any term (express or to be implied) negating the obligation, one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose.

37. Further, in *Viking Grain Storage v T.H. White Installations Ltd*,<sup>14</sup> Judge John Davies said:

The virtue of an implied term of fitness for purpose is that it prescribes a relatively simple and certain standard of liability based on the “reasonable” fitness of the finished product, irrespective of considerations of fault and of whether its unfitness derived from the quality of work or materials or design.

38. Where an employer can be seen to rely on a contractor for the design, the contractor’s legal responsibility is to produce (in the absence of express provision in the contract) a final work which is reasonably suitable for its purpose. Where there is express provision, the absence of negligence in the design will not therefore be a defence for the contractor.
39. In England, since it can be difficult for contractors to obtain insurance for a fitness for purpose obligation, many standard forms or bespoke contracts limit a contractor’s design responsibility to that of a consultant.
40. There is one potential defence to the contractor. The obligation to provide works that are fit for their purpose will only be effective if elsewhere in the documentation the purpose has been clearly made known to the contractor. A contractor under such an obligation should ensure that, for example, he has been provided with a general description of any outputs that the employer intends to achieve, or an indication of how the employer expects the plant to perform in a given number of years.
41. Under the SBC, when the Contractor’s Design Portion Supplement is used, there is no fitness for purpose obligation. However, the contractor must complete the design with reasonable skill and care. The contractor’s design obligations are set out in conditions 2.2 and 2.19.<sup>15</sup> The obligations of the contractor in relation to design are limited to the design it produces and there is express exclusion in condition 2.12.2 of any liability for the employer’s design:

The Contractor shall not be responsible for the contents of the Employer’s Requirements or for verifying the adequacy of any design contained in them.

42. This express exclusion of liability for the contents of the Employer’s Requirements arises as a result of the case of *The Co-operative Insurance Society Limited v Henry Boot Scotland Limited*.<sup>16</sup>
43. The case concerned the JCT 1980 Standard Form of Building Contract Private with Quantities, including Contractor’s Design Portion Supplement. The contractor was, responsible for amongst other things, the design of the earthworks support to sub-basement excavations, bored bearing piles to foundations and contiguous bored piled walls, together with temporary propping to the contiguous bored piled walls and temporary supports and propping to the walls of adjoining properties.
44. The contract contained a number of additional conditions, namely:
- (i) Clause 2.11 required the contractor to ensure the proper integration and compatibility of the various elements of the works, one with another, and with the remainder of the works; and
  - (ii) Clause 2.12 made the contractor responsible for the coordination of

14. (1986) 33 BLR

15. The design obligations in the Design and Build Contract are set out in clauses 2.1 and 2.17.

16. (July 2002) (2002 CLJ Volume 19, page 109).

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the design to the extent that such design was stated in the Contract Documents to be the responsibility of the contractor.

45. In addition, there were unusual features in the way in which the Contract Documents had been prepared. There should have been separate documents for the Employer's Requirements, Contractor's Proposals and Contract Sum Analysis in respect of the Contractor's Design Portion, but none was actually used, although there was reference to both the Employer's Requirements and the Contractor's Design Portion in sections of the Bills of Quantity.
46. HHJ Seymour QC, who heard the case, decided that the contractor was responsible for satisfying itself, using reasonable skill and care, that assumptions upon which the pre-existing design had been proposed and which the contractor was responsible for developing to the point where it was capable of being constructed were appropriate and in doing so this involved checking the Employer's Design was not defective or negligent. He said:

In my judgment the obligation of Boot ... was to complete the design, that is to say, to develop the conceptual design [of the Employer] into a completed design capable of being constructed. The process of completing the design must, it seems to me, involve examining the design at the points of which responsibility is taken over, assessing the assumptions upon which it is based and forming an opinion whether those assumptions are appropriate. Ultimately, in my view, somebody who undertakes, on terms such as those of the contract an obligation to complete a design begun by someone else agrees that the result, however much of the design work is being done before the process of completion commenced, will have been prepared with reasonable skill and care. The concept of "completion" of a design of necessity, in my judgment, involves a need to understand the principles underlying the work done thus far and to form a view as to its sufficiency.

47. The case has, however, been treated as providing guidance on the interpretation of the Standard Forms and, as a result, the accepted interpretation is that the 1998 Contracts require the contractor to check the Employer's Requirements.
48. Nevertheless, whether the JCT likes it or not, when using the 1998 versions of the Standard Form of Contract with Contractor's Design, employers frequently insert a provision expressly requiring the contractor to check the Employer's Requirements and no doubt this practice will continue.

## Damages - who pays and how much?

49. As is well known, the basic principle is that awards of damages for breach of contract are intended to put the innocent party in the position they would have been in had the contract been properly performed, so far as money can do this. The purpose of damages is to put the claimant back into the same financial position as he would have been in but for the breach. The purpose of damages is not to punish the defendant but to compensate the claimant.
50. Essentially, unless the claimant can show that he has suffered a financial loss, he will be entitled only to nominal damages. Where the claimant has suffered financial loss, then money will be able to do this relatively easily. So, for example, the usual measure of damages for defective work or materials is either the diminution in value of the property which results from the defects, or the cost of putting the defects right, subject to considerations of reasonableness and mitigation of loss.
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51. It is rare for a complex construction project to be completed without there being at least some minor breach of the contract requirements concerning the quality and attributes of the finished building. Virtually all construction contracts contain very detailed specifications, drawings and details relating to such matters, and a combination of the complexity of the construction itself and human nature gives ample scope for minor deviations from the contractual specifications.
  52. The normal measure of damages for defective work is the cost of reinstatement taken at the time when the defect was discovered.<sup>17</sup> The claimant will not necessarily lose his entitlement to damages if he waits for the outcome of the case before carrying out the remedial works it all depends upon the circumstances of the case.<sup>18</sup>
  53. Where the law has had difficulties in the past is where there has been a breach of contract but the innocent party claims damages for example, for distress, anxiety, discomfort, inconvenience and loss of amenity which fall outside these two recognised classes of damages.
  54. In most cases, the building owner will be able to recover damages representing the costs of remedying any breaches of the requirements of specifications without great difficulty. However, this may not always be so. To give an example, suppose that a specification for the construction of a ten-storey office block stipulates that the first ten courses of brickwork are to be built using a particular coloured brick, but that the contractor uses a different colour from that stipulated. In these circumstances, what is the building owner's remedy? They will not have a claim for loss represented by diminution in value, since the value of the office block is unaffected. Can they recover the cost of remedying the defect, involving dismantling large parts of the building and replacing the bricks with those of the right colour? Again, the answer is likely to be no, since a court would regard the cost of repairing the defect as wholly disproportionate to the loss suffered and therefore unreasonable. In these circumstances, the contractor will no doubt argue that the building owner has suffered no loss, so that the contractor should not be accountable for their breach.
  55. In consumer contracts, claims are frequently included, in claims for damages for breach of contract, for damages for "distress, anxiety, disappointment and inconvenience". In commercial contracts, however, such damage is unlikely to be suffered, let alone be recoverable. As stated in *Johnson v Gore Wood & Co*, contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude.
  56. This suggests that the building owner may be left without remedy as a result of the contractor's breach. The House of Lords in *Farley v Skinner*,<sup>19</sup> however, has restated the law on the recoverability of damages for non-pecuniary losses and suggests that the building owner may, in fact, be entitled to recover an award of general damages for loss of amenity.
  57. By all events, damages are fundamentally assessed on the compensatory principle. That is to say that the aim is to provide full compensation to the claimant for the wrong and to restore him to the position he would have been in had that wrong not been done. The aim is not to penalise the defendant as such.
  58. If restoring the claimant to the position he would have been in but for the wrong means that the claimant will be left better off than he would have been had the wrong not been committed, then the law does not act

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17. 1966 3 ALL ER 619 *East Ham Corporation v Bernard Sunley*

18. 17 BLR 104 *William Cory & Son Ltd v Wingate Investment (London Colney) Ltd*

19. 1980 [2002] 2 AC 732.

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to prevent such a result.<sup>20</sup>

59. It follows from the compensatory principle that the claimant is prima facie entitled to recover not just the loss directly resulting from the wrong, but also his consequential loss, including any future loss.
60. Difficulties and arguments in the assessment of damages almost all derive from the problem of trying to apply this principle to the facts of a given case, and quite often from a failure to apply it.
61. The cost of making construction works conform to contract is regarded as the ordinary measure of damages for defective performance under a building or engineering contract. But if the cost of reinstatement is out of all proportion to the benefit to be obtained by the building owner from the remedial works then the correct measure is the diminution in value.
62. Where the claimant's claim is based upon breach of an obligation of the defendant with regard to building work, the main head of damage is usually the cost to the plaintiff of having the work remedied or completed, or otherwise obtaining what he has a right to expect from that defendant. In breach of contract cases the plaintiff must give credit for any sums he has not paid, but which he would have been obliged to pay, had the defendant completed his contractual obligations.
63. It should be stressed that this rule applies where the claimant has a right to the proper execution of work. Different rules apply to negligent surveyor cases where the defendant's only obligation was to advise upon an existing building. A surveyor who negligently fails to identify dry rot does not cause that dry rot and is liable only for such loss as arises subsequently. The basic rule is subject to occasional exceptions.
64. In *Newton Abbott Development Co. Ltd v Stockman Brothers*<sup>21</sup> it was held that a property development company was entitled to recover the diminution in the value of houses that it had sold in their defective state. It is thought that there is an exception to the basic rule where remedial work would be wholly inappropriate. Ordinarily, the claimant will be entitled to the cost of reinstatement, unless it would be unreasonable to reinstate.
65. In *William Cory & Son v Wingate Investments*,<sup>22</sup> the claimants were warehousemen who had entered into arrangements whereby the hardstandings should have been concrete. Instead they were constructed of tarmac, which was not suitable and which was going to require re-surfacing within 5 years, whereas the concrete would have lasted 40 or 50 years. Re-surfacing in concrete was going to cost £117,000, and a cheaper solution of asphalt on tarmac was going to cost £63,000. At first instance, the Judge said this:

In my judgement, the prima facie rule is that the Plaintiff is entitled to such damages as will put him in a position to have the building to which he contracted unless the cost of reinstatement is wholly disproportionate to the advantages of reinstatement. There can be little doubt that had a concrete surface been laid initially, it would not have had to be re-laid during the currency of the leases. On the other hand, it would have been necessary to re-lay an asphalt surface at least once and possibly twice. The position today is unchanged. On that ground alone the cost of reinstatement cannot be said to be wholly disproportionate to the advantages of reinstatement. The advantages are the relief of the necessity to re-lay the surface in 20 years or so, with the cost and disruption which that would involve. The Defendants contend that the Plaintiffs can be compensated for the cost of re-laying asphalt by the payment of compensation and that, in any event, that contingency will be taken into account in part in the rent reviews. I consider

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20. *British Transport Commission v Gourley* [1956] AC 185. It should be remembered that in calculating a loss by the claimant, the incidence of hypothetical tax on any actual and prospective loss of earnings, etc., must normally be taken into account. Damages are therefore assessed on the basis of the net loss.

21. (1931) 47 T.L.R. 616.

22. (1980) 17 BLR 109.

these possibilities to be fraught with uncertainty. It would be difficult, if not impossible, to determine a basis of compensation, and the extent that an inferior surface could be taken into account in a rent review is uncertain. On the other hand, as Mr Wood said, providing concrete would fulfil the conditions specified by the Plaintiffs. They would not have to do maintenance or replacement work other than what they would have done if the contract had not been breached. No speculation for assessing compensation would be necessary, and it would save possible injustice under the rent review clause.

66. The case went on to the Court of Appeal, where Walton J said:

There may be many cases where the carrying out of remedial work to bring the building into line with the specification may be so entirely out of line with what the cost of those works would be and the nature of those works having regard to the nature of the building as a whole that the court would gladly accept some other basis for the assessment of damages. But from first to last in this case nobody has ever suggested that a concrete hardstanding is either extravagant or something so utterly outside what would be found in a normal contract to provide a depot of this kind as to cause the courts to say that something cheaper but equally as good ought to be substituted. If [tarmacadam] is a substitute for concrete, which itself is estimated to outlast the length of the two leases without renewal or repair, it is a poor substitute. Can it really be that the court can substitute margarine for butter in this manner, even though many people cannot tell the difference? For myself I entirely refute such suggestions; once it has to be admitted, admitted it has been, that the tarmacadam will need replacement by something else in the very near future, speaking for myself I think that that is an end of this part of the case. But even if it is not, then at the very least it must be shown, and shown conclusively, that the plaintiffs are acting unreasonably in asking for concrete instead of asphalt. Here the only consideration advanced is the matter of cost. Taking 1977 prices, the concrete solution costs about £117,000 and the acceptable asphalt solution about £63,700. But that latter is not a comparable figure: the asphalt itself would not last for the remainder of the 42 years and would have itself to be renewed again at some stage, and in renewing it, the plaintiff's business would thus be disrupted not once but twice.

67. In *George Fischer Holdings Limited v Multi Design Consultants Limited*<sup>23</sup> HHJ Hicks QC awarded damages, not only for the cost of remedial work, but also for loss of value on the ground that:

In point of principle a plaintiff who carries out the best and most economical repair which can be devised to defective property that is left at the end with an asset for which purchasers in the market are not prepared to pay as much as one which never had the defects has plainly lost both the money expended on the repair work and the residual difference in value.

68. In *Ruxley Electronics and Construction Ltd v Forsyth*,<sup>24</sup> Mr Forsyth engaged the plaintiff to construct a swimming pool with a maximum depth of 7 feet 6 inches. The pool built extended to only 6 feet 9 inches in depth. At first instance, the judge found as a fact that the pool was perfectly safe, and that it would be unreasonable for Mr Forsyth to rebuild the pool. Mr Forsyth was awarded £2,500 for loss of amenity. He appealed, giving an undertaking that he would use any damages recovered to reinstate the pool, and the Court of Appeal awarded the full cost of reinstatement of £21,560. The House of Lords held that this was out of all proportion to the loss actually suffered by Mr Forsyth and that the damages to be awarded should be limited to the difference in the value of the actual pool compared with the requested pool. Lord Mustill stated:

the test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the

23. (1998) 61 Con LR 85

24. [1995] 3 All ER 268

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cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the employer. But it would be equally unreasonable to deny all recovery for such a loss. The amount may be small, and since it cannot be qualified directly there may be room for difference of opinion about what it should be. But in several fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.

69. Lord Jauncey said:

in the normal case the court has no concern with the use to which a plaintiff puts an award of damages for a loss which has been established. Thus irrecoverable damage to an article as a result of a breach of contract will entitle the owner to recover the value of the article irrespective of whether he intends to replace it with a similar one or to spend the money on something else. Intention, or lack of it, to reinstate, can have relevance only to the reasonableness and hence to the extent of the loss which has been sustained. Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant.

70. In summary, the principles in *Ruxley* are as follows:

- (i) The question of whether you will be allowed the cost of the remedial works claimed should be answered according to whether remedial cost would be so wholly disproportionate to its benefit as to make it unreasonable.
- (ii) If it is so disproportionate, you may be entitled to recover on the basis of diminution of value, if there has been any.
- (iii) Damages are not limited to only diminution of value or reinstatement. The court in *Ruxley* recognised that there may be a middle figure to reflect loss of amenity or inconvenience through the claimant not having received what he wanted and what he contracted for.

71. In *Earl Freeman v Mohammed Niroomand*,<sup>25</sup> considered shortly after *Ruxley*, the issue again was over the measure of damages and the availability of diminution of value or reinstatement. Freeman had entered into a contract to carry out building work to Niroomand's home and the work included building a porch, in accordance with the drawings prepared by the architect. Freeman built the porch but did not build it according to the architect's drawings and specifications.

72. As in *Ruxley* there was no diminution of value to the house from this breach of contract and to rebuild the porch to conform was unreasonably costly. It is noteworthy that the claimant in this case indicated he did not want rectification work undertaken on the existing structure as this would decrease its size. The Judge awarded nominal damages to represent the amount saved by the builder. This was upheld in the Court of Appeal. In *Farley v Skinner*,<sup>26</sup> a case about the impact on a house purchase of aircraft noise, there was no diminution in value caused, yet the House of Lords awarded general damages for distress and inconvenience. So it seems that if there is no diminution and an immaterial contractor's breach and either the building owner decides not to carry out rectification works or the costs are disproportionate to the nature of the loss, then the building owner in principle should be able to bring a claim for loss of amenity to compensate for not getting exactly what he contracted for.

73. This case provides confirmation of the principles of recovery set out in the earlier cases. A party will be entitled to rectification if reasonable in

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25. (1996) 52 Con. L.R. 116 CA  
26. [2001] UK HL 49

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the circumstances. When the costs involve the complete replacement of a system, that will not necessarily be unreasonable and it will be dependent on the facts of each individual case.

## Rectification costs

74. Since *The Board of Governors of the Hospitals for Sick Children and Another v McLaughlin & Harvey plc and others* (“*Great Ormond Street*”)<sup>27</sup> it has become something of a construction lawyer’s “rule of thumb” that if a claimant wants to recover the cost of rectification it is more likely to do so if remedial works have been carried out upon a professional consultant’s advice.
75. That rule was tested in the case of *McGlenn v Waltham Contractors Ltd & Others*,<sup>28</sup> which came before HHJ Coulson QC. The case concerned a house called ‘Maison d’Or’ that was built for the Claimant, in St Aubin, in Jersey. The house took three years to build. Following the departure of the building contractors in January 2002, when the house was substantially complete, it sat empty for the next three years whilst the alleged deficiencies in its design and construction were the subject of extensive investigation by a team of experts and contractors.
76. In the early part of 2005, it was completely demolished. It was never lived in and has not been rebuilt. It was the Claimant’s case that Maison d’Or was so badly designed, and so badly built, that he was entitled to demolish it and start again. The original claim was for damages for breach of contract/negligence against the building contractors, the architects, the structural, mechanical and electrical engineers and the quantity surveyors and project managers. The contractor played no part in the hearing because they were in administration.
77. The Claimant’s primary case on damages was put by reference to the actual cost of demolition and the estimated cost of rebuilding the whole house, calculated at £3,649,481.34. An alternative case was put by reference to the estimated costs of repairing the individual elements which were said to be defective, producing a final figure of £2,487,246.29.
78. As we have discussed above, the basic starting point is that awards of damages for breach of contract are intended to put the innocent party in the position they would have been in had the contract been properly performed, so far as money can do this. So, for example, the usual measure of damages for defective work or materials is either the diminution in value of the property which results from the defects, or the cost of putting the defects right, subject to considerations of reasonableness and mitigation of loss. The normal measure of damages for defective work is the cost of reinstatement taken at the time when the defect was discovered. However, if the cost of reinstatement is out of all proportion to the benefit to be obtained by the building owner from the remedial works then the correct measure is the diminution in value.
79. Therefore following the *Ruxley* principles, where reinstatement is the appropriate basis for the assessment of damages, it must be both reasonable to reinstate and the amount awarded must be objectively fair as between all parties. In the case here before Judge Coulson, the following two issues arose:
- (i) Was the Claimant entitled to damages against each Defendant based on the costs of demolition and rebuilding, as opposed to the costs of repair, as a result of the decision in *Great Ormond Street*? And

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27. [1987] 19 Con LR 25

28. [2007] EWHC 149 (TCC)

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(ii) What was the right measure of loss in the present case?

80. As noted above, it has often been thought that a claimant would be entitled to the cost of the work carried out pursuant to that expert advice. Judge Coulson disagreed with that proposition. He referred to the case of *Skandia Property UK Ltd v Thames Water Utilities Ltd*<sup>29</sup> where the claimant was advised by experts that a tanking system was the only practical way to protect a building that had been damaged by a flood caused by the defendant. However, at the time that such advice was given and acted upon, the experts had been unaware of pressure grouting treatment which had been performed some time prior to the flood, and which meant that the flood had not in fact damaged the integrity of the building. The tanking system that was put in as part of the remedial scheme was therefore shown to be unnecessary. In the Court of Appeal Waller LJ noted that:

Certainly, simple reliance by a plaintiff on an expert cannot be the test as to whether a plaintiff has acted reasonably in making an assumption, albeit, provided the plaintiff has provided the expert with all material facts and the expert has made all reasonable investigations, the advice will be a highly significant factor.

81. The Claimant argued that as the decision to demolish Maison d'Or was taken on expert advice and it was not suggested that that expert advice was negligent, accordingly, he was entitled to the costs, or a proportion of the costs, of demolition and rebuilding as against each of the Defendants. The Defendants argued that *Great Ormond Street* was not authority for the wide proposition that the existence of expert advice to demolish and rebuild automatically means that, without more, the Defendants are liable for the costs of such work, and that all other considerations are essentially rendered irrelevant.
82. This was the approach the Judge preferred. The correct way to proceed was on the basis that each Defendant should only be liable for the damage for which that Defendant was responsible. The overriding test was one of reasonableness. Accordingly, damages in respect of each Defendant should be measured by reference to the cost of reinstating those individual defects for which each Defendant was found to be liable, not for the (greater) costs of demolition and rebuilding. The decision in *Great Ormond Street* could be distinguished from the present case in a variety of significant ways. For example, the defects at Maison d'Or affected all of the main elements of the house. However, most of these defects were aesthetic in nature. In *Great Ormond Street*, most of the problems were connected with the structural soundness of the building itself.
83. The Judge was also troubled by the decision to demolish the building. As he noted, this is an extreme course particularly where the majority of the defects related to aesthetic matters only. The only justification to demolish, in the view of the Judge, would be because the building is dangerous or structurally unsound. Further, there was only a relatively modest difference between the costs of demolition and rebuilding and the cost of repair. That was a relevant matter in any consideration of which remedial scheme to adopt. Demolition and rebuilding should always be an option which should only be considered as a last resort.
84. Finally, it was necessary to bear in mind that the Claimant's claim was made against a number of Defendants who had different liabilities for the items which were said to have justified the demolition. Even if the Claimant had acted reasonably in deciding to demolish the house, was it

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right that he could recover the costs of demolition as damages against a particular Defendant in circumstances where only a handful of those defects were the responsibility of that Defendant? The Judge felt that the attempt to allocate the costs to each Defendant on a percentage basis was global or even arbitrary, and thus contrary to practicalities and common sense.

85. The claim for the costs of demolition and rebuilding should be contrasted with the claim for the costs of repair. The claims in respect of the cost of repair were largely agreed, having been the subject of careful consideration and discussions between the experts. Detailed remedial solutions had been agreed by the technical experts and quantified by the surveying experts.
86. Judge Coulson was clear that the recent authorities make plain that the court must award damages that are reasonable and objectively fair as between the claimants and the defendants. It would be unreasonable to award an arbitrary allocation of the costs of demolition and rebuilding instead of the agreed figures for the cost of repair. The Judge also took heed of the warning in *Skandia*, and treated the expert advice as a factor, but not the only factor, relevant to the issue of reasonableness. Therefore he decided that the right measure of loss in this case was the agreed cost of the work necessary to repair the defects for which each Defendant was liable. That was the basis on which the liability experts had worked in agreeing remedial schemes for the individual items in the Scott Schedule, and it was the basis on which the quantum experts had agreed the figures. The cost of the remedial work was the reasonable measure of loss in all the circumstances and it would be unreasonable to assess the damages by reference to any other methodology.
87. The following guiding principles can be established from the *McGinn* decision:
- (i) Traditionally, compensation for damage to property has been based on diminution in value;
  - (ii) More recently, in claims against contractors or professionals, the appropriate measure of loss is usually the cost of reinstatement/repair;
  - (iii) A potential claimant who carries out repairs must act reasonably;
  - (iv) If there are two equally efficacious alternative remedial schemes, and one is cheaper than the other, then prima facie the claimant is obliged to put in hand the cheaper of the two schemes.
88. The problem for Mr McGinn was that, whilst he may have acted reasonably in deciding to demolish the house because of the expert advice he received as to the cumulative effect of all the defects, he could not recover the costs of demolition as damages against a particular Defendant in circumstances where only a handful of those defects were the responsibility of that particular Defendant.
89. This was a view which had previously been reached by HHJ LLOYD QC in *Birse Construction Ltd v Eastern Telegraph Co Ltd*<sup>30</sup> that, even if a claimant has carried out remedial works on a consultant's advice, it will not necessarily recover the cost of rectification of defects, even if "numerous and seemingly reprehensible", if the same have not caused damage or are not likely to cause damage in the future in other words, where there was no real need for remedial work.

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90. This case concerned a residential training college built by Birse for Eastern Telegraph. Eastern Telegraph complained that there were various defects in the college but as it had decided to sell the property it did not undertake any rectification work. Eastern Telegraph found a buyer for the property, and negotiated a price which did not appear to be discounted on account of any of the defects.
91. Eastern Telegraph claimed from Birse damages on the basis that it had not received what it had contracted for and it also noted that the defects made the college unsightly and affected the comfort. Birse contended that Eastern Telegraph had incurred no loss as the price it had negotiated for the sale of the property was not affected by the defects.
92. On the issue of the measure of damages for defects the court held that although the normal principle was to award the reinstatement cost for defective works, these costs had to be reasonable on the facts of the case. Where the costs were out of proportion to the real loss incurred then it was necessary to use a different measure for assessing the costs to be awarded.
93. The court held that a reasonable owner would have put right the defects that affected the general appearance. Eastern Telegraph had not done so and it was clear it had no intention of carrying out works of this nature. On that basis it was held that a claim for damages based on unremedied defects (which were not going to be remedied) was unreasonable.
94. The loss as a result of the unremedied defects was minimal and it would be out of proportion to award reinstatement costs, therefore the court awarded a nominal sum of £2 for breach of contract in respect of the unremedied damages. The court noted that Eastern Telegraph was entitled to recover costs already incurred in remedying defects of workmanship that amounted to breaches of contract by Birse.
95. Interestingly, HHJ LLOYD QC also commented on the occurrence of minor defects in construction contracts generally. The Judge held that the existence of a number of minor defects should be regarded as “normal” for a building contract:

I ought to record although the trial necessarily focussed on the quality of workmanship, the documents and evidence did not establish that the overall performance of Birse was below average, although, as will appear, there were too many defects [Para. 4].

96. In a purely commercial contract, if a defect is not visible or deleterious, the claimant should just accept it:

A building owner is not entitled to expect perfection and has to accept work that does not comply with the contract where such work does not materially detract from the intended use and occupation of the building. An owner has to expect and accept unwanted “presents” from the builder, provided that they are not visible and not deleterious. What the eye does not see the heart should not grieve [Para. 130].

How will the courts choose between two conflicting expert reports?

97. This was the question that came before HHJ Coulson QC in the case of *Iggleden & Anr v Fairview New Homes (Shooters Hill) Ltd.*<sup>31</sup> This was a relatively small building defects dispute. The Iggledens bought a new house from Fairview. Although clause 5 of the contract provided the house would be built in good and workmanlike manner, a number of defects appeared. Some were corrected, others were not. One issue related to the driveway which was said to be defective. Two remedial

31. [2007] EWHC 1364 (TCC)

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schemes were proposed by the respective experts. The Judge said that if there are two such competing schemes then the court should bear in mind the approach of HHJ Hicks QC in the case of *George Fischer v Multi-Design Consultants* who said that:

the acceptance of either is, to some extent, dependent, first, on a judgment as to the ability of the designer, who devised suitable detailed treatment of all the potential trouble-spots and second, on an assessment of the guarantees and bonds offered since Soladex would be so much the cheaper, and cannot be said to be the more detrimental to the appearance of the buildings it must clearly be preferred unless the criticisms of its expected effectiveness are made good on the balance of probabilities

98. Here, the Judge found that the schemes were not roughly equivalent from a technical point of view. Therefore the appropriate remedial scheme was the one that was technically the better. As it happened, this was also the cheapest.
99. Another issue for the Judge was whether the claimants had failed to mitigate their loss by refusing to allow the defendant to carry out remedial works. The Judge had to consider whether it was reasonable for the claimants to say that in the light of past events they did not want the defendant to come back to the property to undertake any work at all. The outstanding works were more than mere snagging. They arose out of the defendant's original failure to build the property properly. They were compounded by an unwillingness to do the full scale of remedial works which the Judge had determined were necessary. Thus, on all the evidence, it was not unreasonable for the claimants to say that five and a half years on, they did not want the defendant to return to the property to undertake any further work.
100. Of course, the usual rule is that a contract or must be given the opportunity to remedy the defects (and it is practically and commercially usually better for a contractor to step in and undertake the repairs themselves). In the case of *Pearce & High Limited v John P Baxter and Mrs A S Baxter*, the Court of Appeal held that if the contractor is not given an opportunity to repair the defects then the employers cannot recover the full costs incurred in employing another party to repair the defects. In other words, a failure by an employer to allow the contractor to carry out the repairs or even to give notice of the defects, may well serve to limit the amount of damages that might be recoverable the limit being the amount it would have cost the original contractor to carry out those works.

### What if there is no loss?

101. The basic rule of English law is that a claimant can recover only in respect of his own loss, and if he has not suffered any loss himself, he cannot recover any substantial damages. Thus, for example, if a bus negligently careers out of control and takes the sides off a row of parked cars, a claimant can recover only the cost of the damage to his own car, and cannot recover in respect of the damage suffered by his neighbours' cars.
102. There are some well-known exceptions to this rule, one of these being insurance. Thus, in the above example, a claimant can recover from the negligent bus company notwithstanding that his car is comprehensively insured, such that the claimant would not, if the insurance receipt were taken into account, have suffered the loss of the repair bill.
103. In the context of the construction defects, two cases, both decided in
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1986, are of particular interest. The first is *Jones v Stroud District Council*.<sup>32</sup> In that case, although it was Mr Jones who had the cause of action, the remedial work was actually paid for by a company controlled by Mr Jones;<sup>33</sup> the defendants argued that it had not been proved that Mr Jones himself had incurred the loss. The Court of Appeal, however, said this:

It is true that as a general principle a plaintiff who seeks to recover damages must prove that he has suffered a loss, but if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property has been or will be repaired, I do not consider that the court is further concerned with the question whether the owner has had to pay for the repairs out of his own pocket or whether the funds have come from some other source.

104. The second of the 1986 cases is *Design 5 v Keniston Housing Association Limited*.<sup>34</sup> In that case, the counter-claiming housing association had to spend money remedying design defects for which the defendant was responsible. The defendant's argument, in short, was that the housing association suffered no loss because it would recoup the whole of the remedial cost under a Housing Association Grant ("HAG"). The housing association succeeded, however, on two grounds. First, the judge found that it was not necessarily going to get the HAG, but the judge went on to make remarks that would apply even if it was:

One may instinctively recoil from the argument that the defendants have in that respect suffered no loss, but wherein lies any fallacy in that argument?

It is pertinent to note that the general rule, that only nominal damages can be awarded where there has been a wrong but no loss, has never been absolute. Various exceptions are as old as the rule itself: others have developed piecemeal.

I have not been referred to any decision that directly covers the present circumstances; those exceptions relating to the exclusion from any calculation of damages of all monies received by way of insurance or benevolence do not appear to be apposite for there has not been in any case in this sense a purchase of any right of indemnity, nor is the Secretary of State empowered to act out of benevolence.

in this respect it is sufficient to echo the comment expressed in the argument of the defendants, namely that the purpose of HAG is to provide housing for the needy, and not to be used to relieve professional advisors from the financial consequence or breach of contract and negligence.

105. More recently, HHJ Toulmin CMG QC had to consider whether a claimant was actually going to carry out any reinstatement works. The case was *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd & Ors*<sup>35</sup> and the dispute arose following a fire at a training centre. The LFEPA claimed that since the fire it had not been possible to use the centre for its primary purpose and the training had to be undertaken elsewhere at substantial additional cost. The LFEPA claimed for the costs of repair of the damage caused by the fire, the costs of investigation of the cause of the fire, the replacement of defective ductwork and associated equipment and loss of use based on a 45-month shutdown.

106. The Judge said that to succeed, the LFEPA must establish that Halcrow design was negligent and that this negligence caused the loss as claimed. In considering the second point, it was necessary to consider not only whether Halcrow's alleged negligence caused the loss but whether the LFEPA suffered a loss for which it should reasonably be compensated. In

32. 34 BLR 27

33. In law, such a company is treated as a separate entity.

34. 34 BLR 97

35. [2007] EWHC 2546

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other words, was it reasonable for the LFEPA to recover the cost of reinstating the property? The Judge in particular had in mind the words of Clarke LJ, who in the 2001 case of the *Maersk Colombo*, said that:

Ruxley also supports the proposition that, although what a claimant does with any damages he receives is irrelevant, his intention to reinstate or not to reinstate, while not conclusive, is relevant to the question whether it would be reasonable to reinstate the property

107. The LFEPA claimed that they intended to carry out the reinstatement works but that it was prudent for it to wait and see what damages were awarded before commencing the works. Halcrow put in issue the intention of LFEPA to carry out any remedial work. They said that the LFEPA had taken no steps since the fire more than two years ago to implement any remedial scheme. The Judge commented that there was no documentary or other evidence about the LFEPA's intentions. The court had offered to postpone the trial on quantum. However, on the basis of the evidence, he could not conclude that the LFEPA would carry out any of the remedial schemes. Accordingly, the Judge was satisfied that it would not be reasonable for the LFEPA to carry out remedial works (for which damages were claimed) and, in addition, that they had no intention of doing so in any event.

### Date of assessment of damages

108. The cost of repair was once thought to be assessed as at the date of the breach. It is now clear that this so-called rule is merely a mitigation point, so that if repairs are undertaken at the first time they can reasonably be undertaken then the claimant is entitled to damages assessed at that time, even if that time does not arise until trial. The court will consider either the actual cost of remedial work, or its estimated cost if the work has not been done at the time the damages are assessed.
109. The original strict rule was that damages should be assessed at the date of loss, or at the date the cause of action accrued. The effect of this rule was that the value of any benefit lost, or the cost of any restorative work, would be assessed as at the date of loss, even if it had changed in value since. However, this is not an absolute rule and it has effectively been abandoned altogether in personal injury cases, where the relevant date is the date of assessment.
110. There is also, in any event, the potentially conflicting rule that the court should take into account in assessment, all relevant events between the date of accrual and the date of assessment. The effective date is therefore a matter of the court's discretion. It is actually highly unlikely that damages will be valued literally at the date of accrual. Any evidence of the cost of restoring the claimant to his *position if* will be based on the date the cost was ascertained. It is hardly reasonable to expect a claimant to rectify damage instantly in every case.
111. The appropriate date needs to be considered in conjunction with the claimant's duty to mitigate. It would be contrary to the mitigation principle to value damages at a date earlier than that on which the claimant could reasonably have been expected to rectify the damage. The *position if* principle basically requires damages to be valued at the date of assessment except insofar as any alteration in value between the date of accrual and the date of assessment has been caused by extraneous factors or the claimant's failure to mitigate.
112. In the case of repairs to property, damages should be assessed as at the
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date on which it is reasonable to expect the claimant to undertake the repairs: *Dodd Properties (Kent) Ltd v Canterbury City Council*.<sup>36</sup> This may be as late as the date of trial or assessment.

113. Finally, the court may have regard to the fact that a claimant may be unable to carry out the repairs until such time as he has established liability and is awarded damages, in which case date of trial will necessarily be the appropriate date: *Perry v Sidney Phillips & Son*.<sup>37</sup>

### Claims by residential employers for general damages

114. Employers will often bring claims for loss of use caused by the defects. Much will depend on whether or not the development was intended for commercial use.
115. In the case of *Bella Casa v Vinestone*,<sup>38</sup> Vinestone granted a long lease of an apartment to Bella Casa and agreed to procure the carrying out of refurbishment works to the property. The apartment was purchased for the occasional use of one of the directors of Bella Casa who did not reside in the UK. Bella Casa commenced proceedings against Vinestone and various construction consultants and the building contractor, alleging that the works carried out were in breach of the Defective Premises Act 1972 as well as in breach of contract and the common law duty of care. Bella Casa argued that it was unable to use the property as it was unfit for human occupation. Bella Casa's claim was based on loss of use, including expenses incurred such as service charges, whilst the property was uninhabitable. At a hearing of preliminary issues, HHJ Coulson QC held that Bella Casa's loss of use claim for service charges and utility bills paid was a claim for special damage and, subject to all questions of proof, causation and mitigation, was in principle recoverable.
116. Employers also typically bring claims for suffering stress, anxiety or inconvenience. These claims will be allowed, although only to a modest extent and only if the employer is an individual and not some form of corporate vehicle. Judge Coulson, again in the *Bella Casa v Vinestone* said this:

The present case is entirely different. The property was not a commercial asset in the same way. It was not purchased to generate income during its lifetime; therefore it could not be said that its value would be recovered during that lifetime by reference to the income that it generated...

I regard the claim for general damages for loss of use set out in Paragraphs 40.2(Ai), 42.2(Ai) and 44.2(Ai) of the Particular of Claim as invalid and irrecoverable, both in principle and on the assumed facts. The traditional method by which claims for general damages for loss of use in building/property cases have been valued by the courts has been by the making of a relatively modest allowance for loss of use/loss of enjoyment. Such claims have always been measured in relatively small sums. A claim of this sort, however, is not open to BCL because it is a limited company, not a natural person.

117. Judge Coulson suggested that the way to derive a modest amount might be to follow the case of *Bayoumi v Protim Services Ltd* (1996) 30 HLR 785 where a county court judge held that the claimant, who owned a property which suffered from persistent water penetration, was entitled to recover, as general damages for breach of the Defective Premises Act 1972, the sum of £1,500 a year for the four years during which the problems lasted, making a total of £6,000 in all. This was an award of general damages for loss of use and enjoyment.
118. However, the period for which such damages will be awarded does

36. [1980] 1 All ER 928

37. 1982 3 All ER 705

38. [2005] EWHC 2807

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depend on the claimant's conduct. In *Iggleden & Anr v Fairview New Homes (Shooters Hill) Ltd*, the claimant in the view of Judge Coulson, had failed to mitigate their loss. There had been delays and the remedial works should have been carried out substantially earlier. In the Judge's view, the claimant's team should have realised by the summer of 2003, that because of their failure to reach agreement with the defendant over the scope of the remedial work, they would have to carry out the works themselves. The remedial works could and should have been completed by the end of 2003. This had an effect on the claim for general damages by the claimants. The Judge considered that the disruption suffered was the "middle" of the sort of disruption that homeowners suffer in such circumstances. He awarded a typically modest sum in respect of this, calculated at £750 per person per year, by way of general damages. But the claimants were only entitled to general damages up until the period before the end of 2004, the period by which the remedial works should have been carried out.

## Conclusion

119. As I mentioned at the outset, by far the greatest numbers of claims made by employers relate to defects. They will not accept buildings because they are apparently not defect-free. They then pursue actions often many years after the work was carried out. That will continue. It may be that the increasing variety of alternative dispute resolution procedures on offer to the parties, including adjudication, will mean that these disputes can be resolved more easily and economically.

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